No. 17-340

In The Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* STEVE VISCELLI, DOMINGO AVALOS, GABRIEL PROCEL, BRION GRAY, JAMES ZUBER, HECTOR ZELAYA, DESIREE ANN WOOD, THE WAGE JUSTICE CENTER AND REAL WOMEN IN TRUCKING, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Steve Viscelli is a sociologist at the University of Pennsylvania who studies work, labor markets, and public policy related to freight transportation, automation and energy. His primary research focuses on how state policy and informal labor market institutions shape the behavior of workers and firms. Viscelli's last research project examined the effects of deregulation on labor markets and the labor process in the trucking industry and culminated in a book, *The Big Rig: Trucking and the Decline of the American Dream* (2016, University of California Press), in which he examines how long-haul trucking was transformed from being one of the best to one of the toughest blue-collar jobs in the United States. His current book project explores the policy and politics of self-driving trucks and their potential impacts on truck drivers. He submits this brief to provide a better picture of the economic incentives at work in the trucking industry.

Domingo Avalos, Gabriel Procel, Brion Gray, James Zuber, Hector Zelaya and Desiree Ann Wood are current or former owner-operator or Lease-Operator truck drivers.

The Wage Justice Center is a 501(c)(3) non-profit organization that advocates for economic justice in

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[1] In accordance with Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Both parties have consented to the filing of this brief.

California's working communities. It represents low-wage workers facing nonpayment of wages and advocates for policy changes that benefit workers.

REAL Women in Trucking, Inc. is a 501(c)(6) trade association that promotes safety, education, and support networks for truck drivers. REAL Women in Trucking, Inc. helps those in the trucking industry assert their workplace rights and advocates for stronger protections for truck drivers of all classifications.

This brief will aid the Court because it presents arguments and insights on the history of the Owner- and Lease-Operators in long-haul trucking, as well as public policy surrounding the issues presented that are not represented in the lower court opinions or the parties' briefs on record.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner New Prime, Inc. ("Prime"), like other trucking firms, operates under a relatively new economic structure: the "Lease-Operator" model. This system, however, often harms employees by misclassifying them as independent contractors. It also poses a serious threat to the nation's trucking industry which, in turn, jeopardizes the economy.

Firms like Prime attract newcomers to the industry by promising autonomy and stable work. Under the Lease-Operator arrangement, however, drivers can

easily work 40 hours or more per week and still end up *owing money* to their employer. It should be no surprise that "Lease-Operator" firms like Prime often have a turnover rate of well over 100% on an annual basis.

The Federal Arbitration Act prohibits courts from applying the statute to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Court should include the employment arrangements of drivers like Respondent who are misclassified by their employers within the definition of "contracts of employment."

A BRIEF HISTORY OF THE ORIGINS OF LEASE-OPERATOR FIRMS

Respondent Dominic Oliveira is one of tens of thousands of Lease-Operators, workers classified as independent contractors. Lease-Operators are workers who lease equipment from the same motor carriers by whom they are employed. Lease-Operators generally pay all of the expenses associated with operating the equipment. However, Lease-Operators do not have the "operating authority" to contract to haul interstate freight for customers in compliance with federal law. Instead, Lease-Operators operate under the legal authority and within the operations of the motor carrier for which they work.

Within these operations, Lease-Operators are managed in a manner virtually identical to other

"company drivers" properly classified as employees by the motor carrier.

Lease-Operators are most common at firms that employ inexperienced truck drivers.[2] Increasingly they are, like Mr. Oliveira, completely new to the industry and presented with the choice of being an employee or a Lease-Operator as soon as they complete their initial training to be a truck driver.

Contrary to the suggestion of Petitioners and their *amici*, these Lease-Operators are neither a "long-standing tradition in the trucking industry" nor critical to the bulk of freight movements in the U.S. Instead, the Lease-Operator management model is a labor strategy of relatively recent origin used primarily in two very competitive segments of the long-haul industry – refrigerated truckload and dry van truckload. Firms engaged in these segments have employed this strategy to gain a competitive advantage in labor costs and to insulate themselves from the risk of the inherently volatile markets in which they operate.[3] Prime uses drivers like Mr. Oliveira to haul freight in interstate commerce and treats them like employees. It should not be permitted to shield this arrangement from judicial review by relegating all disputes by its drivers to individual arbitration.

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[2] Viscelli, Steve, 2016, *The Big Rig: Trucking and the Decline of the American Dream*. Oakland: University of California Press, Chapter 3.

[3] Viscelli, Chapter 6.

For most of the twentieth century, large trucking firms were profitable and truck drivers, most of whom were members of the International Brotherhood of Teamsters, were among the nation's highest paid blue-collar workers.[4] Before the 1970's pushed the industry to deregulate, extensive economic regulation – made possible by the Motor Carrier Act of 1935 (P.L. 74-255, 49 Stat. 543) – helped the trucking industry restrict both immediate price competition and market entry, creating both profit for trucking companies and high wages for drivers.

The Carrier Act was passed, in part, to address the industry's tendency to create excessive competition. Two trucking-specific conditions led to this excessive competition: First, because trucking lacks asset specificity, trucks are, for the most part, interchangeable and readily available – lowering the barriers to entry. As a result, at times when trucking is profitable, new firms are able to enter the market and existing firms can increase capacity quickly.

Second, because trucking is a derived-demand industry and subject to high market volatility, productivity is entirely dependent on the immediate demand for its services from customers. When demand slackens, some portion of equipment, facilities, and labor will be immediately underutilized. When that happens, firms may have strong incentives to "keep the wheels rolling"

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[4] Belzer, Michael, 2000, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*. New York: Oxford University Press.

by cutting the rate they charge customers, even taking a loss on individual loads to maintain market share or generate revenue to cover fixed expenses and survive down periods. These characteristics mean there is significant risk but very little, if any, profit made by simply owning trucks as an asset.

During the mid-twentieth century, the rise of collective bargaining allowed for wages to be taken out of competition and working conditions standardized across much of the nation. The dominant firms, known as less-than-truckload ("LTL") firms, hauled relatively small loads and used terminal systems to combine the types of goods they had the federal authority to haul based on origins and destination. Firms that held similar authorities set rates cooperatively amongst themselves, which then were approved by the ICC and made public. In short, trucking firms in most segments of the industry did not compete based on how much they paid workers or working conditions. Because regulation restricted market entry, these firms were able to pass higher labor costs on to consumers in the form of higher prices.[5]

The late 1970's ushered in a new wave of deregulation to "promote competitive and efficient transportation services" and "allow a variety of quality and price options to meet changing market demands."[6] The

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[5] See James, Ralph C., and Dinerstein, Estelle, *James Hoffa and the Teamsters*. Princeton: Van Nostrand, 1965. Also, Sloane, Alfred, *Hoffa*. Cambridge. MA: MIT Press, 1991.

[6] 49 U.S.C. § 13101 (LexisNexis, Lexis Advance through P.L. 115-196, approved 7/7/18).

Motor Carrier Act of 1980 significantly reduced the level of federal regulation in the trucking industry. Then, with the ICC Termination Act of 1995, Congress finally ended sixty years of motor carrier regulation. This act eliminated virtually all economic control of motor carriers and abolished federal oversight over the industry.

The consequences of this deregulatory push were swift and robust. The Motor Carrier Act of 1980 plunged the industry into chaos as destructive competition immediately became the norm. By freeing carriers from needing hauling authorities for specific goods and places, the vast majority of the leading LTL firms were driven out of business as new "truckload" firms began by-passing terminals and hauling whatever freight they could find. Intense cost-cutting competition triggered lower wages, greater amounts of unpaid work, and less desirable working conditions for truckers. Total employee compensation per mile fell by 44% in long-haul trucking from 1977 to 1987.[7] Within two decades of deregulation conditions had deteriorated so much that Dr. Michael Belzer, a leading economist of the industry, characterized some long-haul trucks as "sweatshops on wheels."[8] These conditions upended

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[7] Corsi, Thomas M., and Stowers, Joseph R., 1991, *"Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis."* Transportation Journal 30:4-28.

[8] Belzer, Michael, 2000, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation.* New York: Oxford University Press.

labor-capital relations and worker churn became the norm.

To survive, carriers began subcontracting to independent owner-operators. Subcontracting to these owner-operators, who worked primarily in the unregulated field of agricultural hauling, allowed larger motor carriers to shed the costs of expensive, inflexible unionized labor. Trucking firms also used independent owner-operators as a means to avoid the risk of owning their own trucks under the chaotic and hyper-competitive market conditions of the time.[9]

Still, the shift to independent owner-operator labor was short-lived. Despite carrier interest, by the mid-1980's this labor supply declined rapidly as intense competition and declining freight rates bankrupted many trucking firms, including owner-operators. That allowed the most profitable for-hire motor carriers to quickly grow truckload firms and generate profits by leveraging non-union employee drivers and altering route planning and selection. Independent owner-operators were squeezed by declining rates and were no longer able to invest sufficiently in their equipment, which led to poor customer service and a loss of productivity.[10]

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[9] Nickerson, Jack A. and Silverman, Brian B., 2003, "*Why Firms Want to Organize Efficiently and What Keeps Them from Doing So: Inappropriate Governance, Performance, And Adaptation in a Deregulated Industry.*" Administrative Science Quarterly 48 (2003): 433-65.

[10] Corsi, Thomas M. and Grimm, Curtis M., "*ATLFs: Driving Owner-operators into the Sunset.*" Journal of Transportation

The high asset utilization rates achieved by the profitable long-haul truckload companies that emerged after deregulation required dependable trucks and drivers that would accept nearly every load that was assigned to them. These needs intensified as the biggest firms developed increasingly sophisticated load planning with the assistance of new communications technologies in the 1990's.

Most important in terms of technology were satellite-linked computers onboard trucks, like the Qualcomm unit that Prime required Mr. Oliveira to use while working for Prime.[11] Truck drivers at Prime are monitored on a regular basis via satellite-linked computers, commonly referred to as "Qualcomms" – the name of the most common systems manufacturer. Prime's contracts require that all lease-purchase operators use Qualcomm units in their trucks. These Qualcomm units, as suggested above, are extensively used in the industry and can be configured to collect a range of information depending on the settings of the basic software and various add-on software packages available from Qualcomm. The system can also inform managers whether the truck is running, the vehicle's speed, how much fuel it has used, its odometer reading, and a whole range of potential other information, all in real time. The most central features of the basic

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Research Forum 29 (1989): 285-90. Also Corsi, Thomas M. and Grimm, Curtis M., *"Changes in Owner-Operator Use, 1977-1985: Implications for Management Strategy."* Transportation Journal 26, no.3 (Spring 1987): 4-16.

[11] JA66.

software allow for regular updates of vehicle location and speed. This information is sent at regular intervals that can be specified by the firm. Authorized software users, typically including driver managers, can also "ping" trucks, requesting this information from the truck. This information allows managers to track the progress of trucks and determine whether they are on-time to meet delivery estimates provided to customers.

Qualcomm records produced in another case against Prime show that driver managers use this information to directly manage Lease-Operators as one would expect for employees.

These satellite systems allowed firms, for the first time, to monitor drivers in real time and to use that information to direct drivers' activity and coordinate it with that of other drivers. These tools became essential to ensuring efficient operations and creating the level of service customers came to expect in the era of increasingly lean inventories.[12]

As this system developed, independent owner-operators were increasingly seen as unwilling or unable to submit to monitoring and control of these new management systems and maintenance schedules that came to dominate long-haul truckload trucking of refrigerated and dry freight. As a result, although the

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[12] For a detailed account of how this technology allows Prime to monitor Lease-Operators to ensure on-time delivery, see USDOL Hr'g Tr. 58-59, *In the Matter of: Cynthia Rae Ferguson v. New Prime, Incorporated*, 2011 DOL Ad. Rev. Bd. LEXIS 81, on file with author Steve Viscelli.

low pay and reduced capital costs of independent owner-operators were appealing, the number of loads hauled by independent owner-operators in these segments dropped dramatically.[13]

Post-deregulation, the need for control and expensive equipment led the leading truckload carriers to generally favor non-union employee labor. But continually deteriorating pay and working conditions caused increasingly high levels of employee turnover and associated costs. In an attempt to retain drivers longer and gain the cost advantages of the independent owner-operators of the past, carriers began experimenting with new management models. Independent owner-operators with the capital to buy the reliable trucks did not offer sufficiently cheap labor and they clearly did not afford carriers the necessary degree of control. Thus, firms began transforming the labor market institutions around contracting to create a new breed of owner-operator that would fit their needs: the Lease-Operator.[14]

Key characteristics of traditional owner-operators – such as choosing when to work and what loads to haul based on price competition – are fundamentally at odds with the approach taken by the dominant truckload firms. Lease-Operator firms like Prime need workers who, despite having no capital or credit, will

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[13] Corsi, Thomas M., and Stowers, Joseph R., 1991, "*Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis.*" Transportation Journal 30:4-28.

[14] See Cullen, D., "*Owner-operators: A Measure of Success.*" FleetOwner, June 1, 1998, p. 36. Also see Viscelli, Chapter 3.

pay for equipment and take whatever load is offered to them. These firms have re-framed this practice on paper to make it appear as though they are not telling their drivers what to do, but instead encouraging them to do what it takes to meet the needs of their customers and a smart way to "run their own small business."

Through various individual and industry-wide recruitment and informational efforts (e.g., trucking newspapers), a handful of trucking firms began to create a pool of Lease-Operators which were very different from the past owner-operators.[15] In the mid-1970's, a majority of all owner-operators were union members in many segments; virtually none are today.[16] Just before deregulation 33% of all owner-operators owned more than one truck and 16% of all owner-operators owned more than five trucks.[17] By 1997, less than 14% of all owner-operators owned more than 1 truck and less than 2% owned more than five trucks.[18] Perhaps most importantly, by 1997 90% of Lease-Operators

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[15] In this paragraph the term owner-operator is used because due to different survey methodologies and the changing nature of owner-operator/motor carrier relationships after the mid-70s, independent owner-operators and Lease-Operators were not always clearly distinguished in research.

[16] Wyckoff, Daryl D. 1979, *Truck Drivers in America*. Lexington, MA: Lexington Books.

[17] Agar, Michael, 1986, *Independents Declared: The Dilemmas of Independent Trucking*. Washington, DC: Smithsonian Institution Press.

[18] Belman, Dale L., Monaco, Kristen A., and Brooks, Taggert J., 2005, *Sailors on the Concrete Sea: A Portrait of Truck Drivers' Work and Lives*. East Lansing, MI: Michigan State University Press.

received their payments through a permanent lease to haul freight exclusively for a single company.[19] In contrast, only 50% of all owner-operators were under leases of thirty days or more in the mid-1970's and most of these drivers retained the right to haul for other carriers.[20]

Before deregulation, 75-80% of owner-operators hauling for larger motor carriers were paid a percentage of the load revenue and could haul for other carriers, which caused them to turn down loads to wait for better paying ones.[21] Lease-Operators, like Mr. Oliveira, in contrast, are dependent on work from a single carrier for all of their revenue, and thus are very unlikely to refuse loads. Today, there are very few independent owner-operators in the market Prime competes in, which moves primarily food freight for large customers.

ARGUMENT

I. LEASE-OPERATORS LIKE MR. OLIVEIRA ARE MISCLASSIFIED EMPLOYEES.

While there is no question that true independent-owners exist in the trucking industry, Prime's drivers certainly do not meet this classification. Independent owner-operators are distinguished on numerous

[19] Belman, Monaco & Brooks, 2005.

[20] Wyckoff, 1979; Agar, 1986.

[21] Maister, David H. 1980, *Management of Owner-Operator Fleets*. Lexington, MA: Lexington Books.

dimensions from Lease-Operators but primarily by the fact that they:

Lease-Operators	**Owner-Operators**
Operate under the authority of a motor carrier	Must have their own hauling authority (they are in fact single truck or very small for-hire motor carriers, with the legal authority to haul freight).
Do not deal directly with customers and generally have no knowledge of the rates or pricing used for loads	Deal directly with customers in finding and pricing loads
Are assigned loads and paid a fixed rate set by the trucking firm	Set the rates they charge to customers based on market conditions both relative to their costs and competition
Work for large trucking firms	Tend to serve predominately small shippers or concentrate on highly specialized freight that requires specialized knowledge or equipment (e.g., hauling heavy equipment) that does not provide a return to the economies of scale crucial to large truckload firms

Because Lease-Operators lease a truck and pay for fuel, maintenance, and insurance, firms can potentially shift a significant amount of capital and operating costs to them, translating into much lower labor costs per unit of work. And, though Lease-Operators are often nominally free to choose what loads they haul, they are generally under *greater* pressure than employees to accept whatever work is offered to them and to spend more days working because they need to work many more hours per day and days per year to meet fixed expenses and then earn take-home pay at levels even close to what they would earn as company drivers. Getting workers to stay on the road longer is critically important. Prime reports that its company drivers typically stay out three to four weeks at a time, Lease-Operators typically stay out five to six weeks at a time.[22]

Because of their financial vulnerability and the feared costs involved in breaking contracts and switching firms (e.g., loss of funds in escrow accounts, deposits required to lease equipment and future lease payments), Lease-Operators feel less free than company drivers to quit bad firms, resulting in lower turnover than employees when labor markets are tight and there is upward pressure on wages.

Quite simply, Lease-Operators solve the challenge of simultaneously achieving high asset utilization and customer satisfaction with cheaper labor. With Lease-Operators, when workers don't work as hard, get sick

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[22] https://www.primeinc.com/paid-apprenticeship-cdl-training/

or go home, they pay the cost of the idle equipment assigned to them. At the same time, firms don't lose the ability to manage that labor as they would any other employee. Simply because firms like Prime have refined the Lease-Operator management model and now depend on it for the bulk of their labor, does not mean they do not have the ability to adapt or that there are no other working models for sustainable labor in the industry. In contrast to Prime's practices, many other large truckload carriers still rely predominantly on very inexperienced company drivers.[23]

Prime is a firm organized for the purpose of making a profit, not as a small business incubator. The circumstances in which Mr. Oliveira found himself were deliberately structured by Prime to meet its goals. The behavior, opportunities and consequences for Prime's Lease-Operators are the result of that economic relationship. The question is: what is the nature of that relationship? Was Mr. Oliveira a misclassified employee of Prime at all times during his employment or, as the petitioners claim, was he an independent small business person while working as a Lease-Operator for Prime?

When the needs and goals of Prime are understood, what workers like Mr. Oliveira do is clearly best seen not as the result of a "business model" carried out by truck drivers such as Mr. Oliveira but, rather, a labor management strategy designed to increase the

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[23] Burks. 2007.

productivity of employee drivers and Prime's overall profitability.

Furthermore, the nature of Prime's business requires that Prime directly manage Lease-Operators like Mr. Oliveira in the same manner as it would any employee truck driver in order to realize its own interests. Prime does not "buy" discrete units of trucking service from Lease-Operators as one business would from another (using a contract that specifies a particular *outcome*). Instead, Prime "makes" trucking service – that is its core business – and Prime utilizes Lease-Operator labor to carry out that business. Prime manages the labor activity of Lease-Operators as they go about doing their work to ensure that they meet Prime's customers' demands, increase the utilization of Prime's assets, etc. Prime also monitors the labor activity of Lease-Operators and, when Prime management perceives that the firm's goals are in jeopardy (e.g., that a delivery to a valued customer might be late), it intervenes by directing the Lease-Operator's labor activity or by coordinating the labor activity of the Lease-Operator with that of other workers (e.g., it swaps loads between tractors to ensure on-time delivery).[24] From an economic perspective, monitoring, directing and/or coordinating the labor activity of workers in order to realize one's own economic interests of making a profit is the very essence of what it means to *employ*.

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[24] Ferguson USDOL Hr'g Tr. 56-58.

A. Prime's Lease-Operator Management Model is Part of a Coordinated Labor Supply and Management System.

The Lease-Operator model is one component of the overall labor recruitment and management strategy at Prime. It is important to understand how it fits with the other components, particularly to understand how and why, in the event they are actually given a choice, workers might choose to become Lease-Operators without appreciating the consequences. Recruiting and training inexperienced drivers allows firms like Prime to home-grow Lease-Operators. Firms want drivers to follow a career path from trucking school to employee trainee to lease-operating. This is what firms in the industry refer to as their labor "pipelines." Again, the Lease-Operator management model is not a "business model" but a central part of Prime's overall labor supply and management system.[25]

Some trucking carriers provide better compensation to their workers, have more experienced drivers and save on training, recruitment, insurance and other costs. Instead of paying high wages, firms like Prime use inexperienced workers, pay them less and employ a number of coordinated strategies to delay worker exit for experienced workers without raising wages.

Relying on completely inexperienced drivers requires training them, and the need to train new workers has segmented truckload employers into those

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[25] https://www.trucknews.com/features/prime-inc-travelled-a-rocky-road-to-prosperity/

firms that recruit and hire inexperienced drivers and those that do not. While small- and medium-sized firms are unlikely to hire drivers with less than one year of experience due to the cost of training and insuring them and their lower productivity, several dozen of the largest firms, including Prime, have established training programs that allow them to hire drivers with no experience at all.

Operating a training program is a major undertaking and potentially a significant cost to carriers. Prime, like others, uses a contract that requires workers to work for them for a year or pay for training. Economists Hoffman and Burks (2013) concluded that training contracts have reduced quitting at trucking companies significantly.[26] Carriers typically charge drivers more than what they expend on actual training costs. Prime's training contract for what they characterize as a "paid-apprenticeship" requires drivers to work for a year or pay the company $4,475.[27] And, thus, many of the workers who try out trucking every year do so under a modern form of debt peonage.

Once workers can leave without penalty from the training contract – one year of safe driving experience makes a big difference in this labor market – options at better-paying truckload, local, niche, or private

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[26] Hoffman, Mitchell and Burks, Stephen V. 2013. *Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training*, available at: http://dx.doi.org/10.2139/ssrn.2220043

[27] https://www.primeinc.com/paid-apprenticeship-cdl-training/

carriers with better work routines and pay begin to open up. To retain these more experienced drivers, truckload carriers, trucking media, and third-party "business consultants" convince workers to become Lease-Operators, promising that lease-operating will be financially rewarding and give workers additional control over working conditions. But, as suggested above, being a lease-operator ends up being worse for most truckers than being an employee. Simply put, it allows carriers to pay more productive drivers far less than they are worth in relation to other employers in terms of productivity.

Prime and several of its closest competitors in refrigerated truckload freight, like CR England, have recently taken the Lease-Operator management model to a new level. While other firms in the segment typically do not encourage workers to become Lease-Operators until they have six months or a year of experience in the industry, these firms aggressively recruit drivers with no experience at all to be Lease-Operators right out of their initial training – as Prime did with Mr. Oliveira. One of the biggest changes in the Lease-Operator model in recent years is that workers brand new to the industry are paying the entire cost of operating trucks before they can earn any take-home pay. As the evidence in this case makes clear, these drivers not only pay all of these costs but can receive no pay in some weeks that they work. During such weeks, not only does Prime benefit by their drivers' free labor, but they also prosper from the drivers' covering all of the expenses for their trucks. This simply could not occur

in the traditional employment context, and it is difficult to imagine a labor management strategy that would make Prime more competitive than that.

B. Prime Employs Lease-Operators to Perform its Core Business.

Prime's core business is hauling truckload refrigerated freight for large customers. In simple terms, Prime's profitability rests on two core activities: (1) sales activities to find the highest revenue freights to haul; and (2) operations oriented to deliver that freight at the lowest possible cost while fulfilling contracts and satisfying customers. Truckload refrigerated firms like Prime use their resources and relationships with customers to find the highest revenue freight based on predictions of where Prime trucks – both company and Lease-Operator – will be in the future. The sales staff then makes commitments to Prime's customers based on predictions of the operational capacity of the company. In other words, sales staff make contracts to haul freight at a particular price with a given set of characteristics and requirements without any input from or agreement with the drivers – company or Lease-Operators – that will haul it. Prime, in conducting the sales side of its business, does not distinguish between the freight that will be hauled by Lease-Operators and employee drivers. That is a future concern dealt with by the planning and dispatching staff in operations. This means that Prime conducts all of this important work with an eye toward its own interests.

It is then the operations side of the business that is charged with producing the outcomes promised – the delivering of freight from and to particular locations within specified times to Prime's customers as efficiently and profitably as possible. That work will be done by Prime's drivers, whether they be Lease-Operators or company employees.

All drivers at firms like Prime, whether company or Lease-Operators, are not given specific information about what work is available, why work gets assigned to them, and, consequently, what latitude there is to change work assignments. They are told only that there is little flexibility, it is costly and difficult to change load assignments, and that load planning is done systematically and with the greatest possible efficiency and fairness. All of those things are true.

The key to success in load planning is finding the most immediately-available load for each truck while minimizing the number of miles all trucks travel empty to reach that load, known as deadheading. The job of load planners is to find the optimal match of available loads to available trucks.[28] This approach is the most profitable way to act in truckload freight markets and requires flexibility in terms of drivers' work schedules and geographic range. The assignment of loads is interdependent and so if Lease-Operators turn down loads, it can cause a major headache for load planners, who must often rework other drivers' assignments in order to compensate. Driver managers have

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[28] Ferguson USDOL Hr'g Tr. 25.

plenty of leverage over Lease-Operators to ensure that they take the loads assigned to them – they can simply threaten to idle them because nothing else is available.[29]

Nearly all truck drivers working in the over-the-road truckload industry are paid either by the mile, as Prime's company drivers are, or by a percentage of the load, as Prime's Lease-Operators are. Truckers try to find the most efficient ways to organize their work tasks in order to increase their pay – *regardless of whether they are employees or Lease-Operators.*

Drivers will make essentially the same kinds of decisions to drive as many paid miles as possible. Though having the ability to choose loads and how they haul loads is common in the rhetoric about the differences between Lease-Operators and employees, at firms like Prime there is no meaningful difference in how these workers are assigned work or managed as they carry it out. Prime controls and assigns all work available to its Lease-Operators. What lease-operating does is raise the stakes for workers to ensure they make the most out of the equipment they are paying for, something that makes them more productive and thus more profitable for Prime. In fact, Prime's founder and CEO Mr. Low often refers publicly to the firm's move from employees to owner-operators as one intended to achieve "alignment" of interests.[30]

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[29] Viscelli, Chapter 4.

[30] https://www.trucknews.com/features/prime-inc-travelled-a-rocky-road-to-prosperity/

Despite this alignment of interests through the compensation scheme, once a driver is under way with a load, Prime driver managers do extensive monitoring and direction of Lease-Operators.[31] Their job is what their name implies: to manage drivers. They do this because ultimately Prime is responsible for making on-time trucking service and Prime retains the authority to manage workers to achieve that end.

Perhaps the clearest indication that Lease-Operators are treated like employees is that their labor activity is coordinated with that of other employees of Prime. The clearest example of this is when a driver manager "repowers" loads.[32] A repower is essentially any time when a driver is given a load to haul but cannot complete it in the time required and so Prime coordinates the load being handed off to another driver to ensure on-time delivery.

This kind of management is entirely inconsistent with the idea that Prime is buying or contracting the services from a separate, distinct transportation company. This would be like you or I contracting with FedEx to transport a parcel for us and, as we are tracking the progress of the parcel online, we realize it will not arrive when we want it to. We would then call a UPS driver and instruct him on when and where to meet the late FedEx driver to ensure a hand off of the package for on-time final delivery. What Prime is doing

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[31] Ferguson USDOL Hr'g Tr. 58-63.

[32] Ferguson USDOL Hr'g Tr. 56-57.

when it repowers loads is clearly directing workers in the making of trucking services.

C. Prime's Lease-Operators are Employees for all Intents and Purposes.

Prime's Lease-Operators are employees, not small business owners. Prime's Lease-Operators cannot and obviously do not "make" trucking services on their own. Prime's Lease-Operator business model is part of the firm's overall labor supply and management system. In fact, Lease-Operators are managed right alongside and simultaneously with company drivers. The only important difference between company drivers and Lease-Operators is that Lease-Operators are responsible for fixed and operating costs, which allows Prime to work them harder and pay them far less.

Prime staff actively manages Prime Lease-Operators as if they were employees, regularly monitoring their activity in real time. There are also clear indications that Prime coordinates the labor of the Lease-Operators with other workers in order to achieve its goals, most importantly, ensuring on-time deliveries of loads. From an economic perspective, the use and management of Prime Lease-Operators is a central part of Prime core business and thoroughly integrated in the most critical processes of that business with the labor of employees.

Prime Lease-Operators do not and cannot independently perform many of the essential tasks required to provide trucking services to customers. In

other words, they simply could not move freight without Prime. They do not find loads, engage with customers to negotiate prices for their services, provide meaningful capital investments or do a wide range of other kinds of work that is required for participation in the business of trucking, including the most fundamental requirement of obtaining the legal authority to provide freight services.

Despite the terms applied by Prime to their situation and behavior, Prime Lease-Operators clearly behave and are treated like employee truck drivers.

D. The Lease-Operator Model negatively Affects Workers.

True independent contractors make daily choices about their working conditions. They can refuse a load that does not pay well. They can take a break when they are tired. As explained below, misclassified drivers do not enjoy these same freedoms.

The experience of *amicus curiae* Domingo Avalos provides an example of a Lease-Operator who is micromanaged by his employer as he does the company's core business.[33] Mr. Avalos has been a truck driver for XPO Cartage Inc. ("XPO") at the Ports of Los Angeles and Long Beach in California since 2010. The State of California's Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE") found

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[33] All information in this section is based on an interview conducted with Mr. Avalos on July 5, 2018.

in December 2016 that Mr. Avalos has been misclassified as an independent contractor. The DLSE further found that he is owed $171,938.25 in back wages, reimbursable business expenses and interest.[34]

Mr. Avalos picks up freight containers at rail yards in the Los Angeles area and delivers them to XPO's customers throughout Southern California. Despite being classified as an independent contractor, Mr. Avalos conducts only the regular work of XPO, which is transportation and logistics. He has no customers or accounts of his own and does not interact with any of XPO's customers. He does not have an incorporated business of any type. XPO dispatches Mr. Avalos to all of his jobs. When Mr. Avalos drives, his truck bears an XPO logo. He may not change or remove the logo, nor put another logo alongside it. He may not make deliveries for companies other than XPO. His routes are set by XPO. When he is not carrying loads for XPO, he is required to park the truck in XPO's lot.

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[34] The DLSE found that when properly classified as an employee, Mr. Avalos is owed $128,396.48 in back wages, $38,290 in reimbursable business expenses and $5,251.77 in interest. XPO has appealed this determination. These amounts accrued over a period of three years, between January 26, 2013 and January 26, 2016, the date on which Mr. Avalos filed his complaint with the DLSE. Under California law, the Statute of Limitations for claims based on statutory rights is three years from the date the right to reimbursement occurred. Mr. Avalos began working for XPO on June 1, 2010. The wages the DLSE found to be owed to Mr. Avalos represent about half the total he would be owed if some of his claims were not time-barred. *Order of the Labor Commissioner of the State of California, Case Number 05-66468 KR.*

After about two years of driving a truck for XPO, Mr. Avalos was told by his employer he would have to lease a truck from the company to continue driving for them. He was required to sign all the paperwork in a large stack of documents. Mr. Avalos is a native Spanish speaker, and estimates that he understands about 10% of spoken English. He cannot read or write in English. Despite this, Mr. Avalos did not have the opportunity to review the paperwork before signing. His employer told him where to sign and initial the documents, which were provided in English exclusively. Among these papers was an agreement to arbitrate. Also included was the lease agreement, whose terms Mr. Avalos was eventually unable to meet. Within three years, he had to give up his lease on the truck. Since this time, he has been driving other drivers' trucks for XPO, and paying the other drivers a fee to do so.

The story of *amicus curiae* Gabriel Procel provides an example of the limited control over the terms and conditions of work some owner-operators enjoy. Mr. Procel has been a truck driver at the Port of Elizabeth in New Jersey since 1998.[35] During this time, Mr. Procel has worked as an owner-operator for about 15 trucking companies.

When Mr. Procel first applied to be a truck driver, he was not offered a contract for full-time employment. Instead, he was offered an independent contracting

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[35] All information in this section is based on an interview conducted with Mr. Procel on July 12, 2018.

agreement. Under the terms of this agreement, the trucking company would lease Mr. Procel's truck in order to insure it when it was carrying their loads. This prevented him from driving for any other companies. He was also instructed to set up his own company. He was referred to a nearby accountant who assisted him in setting up a company in his name. Mr. Procel was then considered an owner/operator of his own company. As such, he was responsible for paying his vehicle insurance, gas, tolls, International Fuel Tax Agreement licensing fees and taxes, all maintenance of his vehicle and parking costs. He received instructions on where to pick up and take the cargo from a teller's window at the company. He was given a large sticker with the company logo to affix to his truck, and was told it must remain on the truck at all times. If Mr. Procel rejected an assignment, dispatchers would retaliate by withholding dispatches for two-or-three days, or by offering inconvenient jobs with long unpaid waiting times. Though he worked for 15 different companies, each company had substantially similar written and unwritten policies.

Mr. Procel worked eight to sixteen hours a day, five-or-six days a week, or between forty-five and ninety-six hours a week. He estimates that 50% of his take-home pay was used to pay insurance, gas, taxes, maintenance and the other expenses enumerated above.

Mr. Procel recently left his employment as a truck driver to join the Teamsters union as an organizer. He

is currently organizing workers who are misclassified as independent contractors.

The account of *amicus curiae* Brion Gray illustrates how difficult it can be to make a living as an owner-operator.[36] Mr. Gray has been driving a truck in the Northeast Corridor for the past six years. He currently drives for Maritime Delivery Services Inc. Mr. Gray's necessary business expenses as an independent contractor are $1,690 to $1,990 a week. For the last month, Mr. Gray has been living in his truck after becoming unable to afford the rent at his apartment in Hightstown, New Jersey based on his earnings as a full-time owner-operator of his own truck. In his words, the company "owns" him.

Amicus curiae Hector Zelaya attempted to work for more than one trucking company at a time, and found out he did not have the independence to make such a choice. Mr. Zelaya is an owner-operator who works in and around Southern California for K&R Transportation LLC ("K&R").[37]

When Mr. Zelaya went to work for K&R, they gave him explicit instructions on how to register a company in his name. Once registered, K&R installed a GPS system on Mr. Zelaya's truck, as well as a variety of stickers and licensing decals bearing the company name. The company told Mr. Zelaya he was required to have

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[36] All information in this section is based on an interview conducted with Mr. Gray on July 18, 2018.

[37] All information in this section is based on interviews conducted with Mr. Zelaya on July 10 and 21, 2018.

the GPS system turned on at all times. He is paid a set amount for each delivery of a load K&R assigns to him. He has no power to negotiate his rates nor the option to refuse an assignment.

When Mr. Zelaya questioned the profitability of an assignment (i.e., when an assignment would require excessive unpaid inspection time at a port), he was told he could go somewhere else if he did not like it because there are other drivers to take his place. In fact, Mr. Zelaya does not have the ability to go elsewhere. He tried. When the company was not giving him many jobs, Mr. Zelaya tried to use his truck to help a friend transport cargo. When K&R became aware of this, likely through the GPS tracking system it had installed, it threatened to take away his privileges, including use of the company parking lot and diesel stations, if he did not stop.

In contrast to the above accounts, *amicus curiae* Desiree Ann Wood is an experienced, self-employed truck driver who books her own freight.[38] Before becoming a true independent contractor, Ms. Wood believes she was misclassified. She drove a company truck and could not take on additional loads for other trucking companies. She was paid by the drive mile, and could not negotiate this rate. Her former employer would send Ms. Wood on multiple jobs in a single day, each with only a short drive required. This resulted in Ms. Wood spending much of the day waiting for cargo

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[38] All information in this section is based on an interview conducted with Ms. Wood on July 10, 2018.

to be loaded or unloaded. Because her wage was tied solely to mileage, Ms. Wood was making a pittance despite working the maximum 14 hours a day allowed under Federal Motor Carrier Safety Administration regulations.[39] Despite the long hours, sometimes her take home pay was only $105.00 per day.

Eventually, Ms. Wood was forced out of the job. She applied for unemployment insurance but was denied simply because the company claimed she was classified as an independent contractor. Though she provided ample evidence that she had exercised no control of or independence in her work, the unemployment board accepted the company's classification of her without an analysis of the nature of the relationship. Ms. Wood was left without any source of income for weeks.

Currently, Ms. Wood is a true independent contractor. She is based in Florida but makes trips throughout the lower forty eight states, while contracting for a company that operates out of Delaware. This new company provides insurance for the tractor and cargo, as well as administrative support. In return, Ms. Wood gets paid up to 98% of each load rate and is able to decide which loads to accept. She can now negotiate load rates based on the ever-fluctuating rate boards. She works when she chooses, makes a living wage, and is truly independent.

Workers' rights organizations such as *amicus curiae* Wage Justice Center offer a broad perspective on

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[39] 49 C.F.R. 395.3(a)(2).

the employment relationship between a truck driver and a trucking company. Jay Shin, Directing Attorney, has represented many workers including truck drivers in class actions and other forms of litigation.[40]

Nearly half of container imports to the United States come through the Ports of Los Angeles and Long Beach ("the Ports").[41] In 2008, the Port of Los Angeles instituted the Clean Truck Program, which put in place environmental standards for all trucks entering the Ports.[42] According to Mr. Shin, most workers who had succeeded in purchasing a truck quickly learned that their trucks did not meet the Ports' new environmental standards. Unable to afford to purchase compliant trucks on their own, many drivers entered into leases with trucking companies. When a driver left a company or was fired, his or her truck remained with the company. All equity a driver had accrued in a truck became the property of the trucking company.

In Mr. Shin's view, instances of misclassification greatly increased at this time. Due to this shift in the power dynamic as a result of the Clean Truck Program, workers found themselves at the mercy of the trucking company whose truck they were leasing.

Over the five-and-a-half years the Wage Justice Center has been representing truck drivers, its attorneys have rarely if ever seen a truck driver who is truly

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[40] http://wagejustice.org/our-team/

[41] USA Today, Brett Murphy, June 16, 2017, "*Rigged. Forced into Debt. Worked Past Exhaustion. Left with nothing.*"

[42] https://www.portoflosangeles.org/ctp/idx_ctp.asp

an independent contractor, though almost all are so classified. Mr. Shin has represented many truck drivers who sleep in their trucks, unable to afford to pay rent on their take-home pay. He has had multiple owner-operator clients file for bankruptcy due to the large deductions from their paychecks for fuel, lease payments, insurance, maintenance and other business expenses.

Amicus curiae REAL Women in Trucking, Inc. has advocated for truck drivers since 2010. In addition to driving a truck full-time, Desiree Ann Wood is the President of REAL Women in Trucking, Inc. In her experience, misclassified drivers rarely see the rate board that she, as a true independent contractor, uses daily to negotiate the best rates for her loads. After paying for fuel, maintenance, taxes and other costs, many misclassified drivers make less than minimum wage. Many live in poverty despite working full-time.

II. THE LEASE-OPERATOR MANAGEMENT MODEL IS A THREAT TO GOOD EMPLOYERS, CONSUMERS AND THE ECONOMY.

A. Misclassification has contributed to a Shortage of Truck Drivers.

The misclassification of drivers like Mr. Oliveira as independent contractors is part of a broader set of labor recruitment and management practices of workers by Prime and similar firms. This constellation of practices creates a direct disadvantage to the misclassified drivers and other honest employers, and more

broadly threatens the economy by contributing to a growing shortage of truck drivers in the United States. This poses a serious threat to the nation's economy which is largely dependent on the movement of goods.

Through extensive advertising, a few dozen firms, including Prime, have established themselves as gateways to the industry for perhaps as many as 150,000-200,000 new truck driver recruits in some years.[43] Those workers are drawn to the trucking industry by the promise of a stable career and wages sufficient to support a family. While traditional employers throughout the trucking industry provide stable jobs for the bulk of truck drivers, they are now starving for labor as the entry segments of the industry, where most new truckers are initially recruited and trained, are increasingly influenced by firms like Prime who use the Lease-Operator management model.

B. The Lease-Operator Model is Growing.

Prime and similar firms use deceptive practices and government subsidies to create a revolving door for would-be truck drivers that allows them to undercut the freight rates of competitors while ensuring healthy profits.[44] Unfortunately, such strategies allow

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[43] Burks, S.V., J. Carpenter, L. Gotte, K. Monaco, K. Porter, and A. Rustichini, "*Using Behavioral Economic Experiments at a Large Motor Carrier: The Context and Design of the Truckers and Turnover Project.*" IZA Discussion Paper No. 2789 (May). Bonn, Germany: IZA, 2007.

[44] For example, for the importance of contracts to pay for training and the overestimation of workers in their potential earnings in

these firms to grow rapidly despite their driver turnover, which often exceeds 100% annually.[45] Moreover, this business model has been gaining traction, threatening to become a *requirement* of operating in certain segments due to the nature of the competition. This threatens not just Prime's competitors but the stability of the country's freight movement system, which the American Trucking Association ("ATA") forecasts is currently short more than 50,000 drivers. By 2026, the ATA expects that number to more than triple.[46]

While just 3.5 million jobs in the U.S. require workers to have a commercial driver's license ("CDL") (these include not just heavy-truck drivers, but other truck drivers and drivers of commercial passenger vehicles), there are around 10 million CDL holders currently in the US.[47] Firms like Prime have built a business model around the practice of cycling through a publicly-subsidized stream of new workers and debt peons. Some workers use public retraining grants

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making motor carriers profitable. See Hoffman, Matthew and Burks, Stephen V., *"Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training,"* May 31, 2013, available at: http://ssrn.com/abstract=2220043

[45] See Harrison, H.D. and Pierce, Julianne, *"Examining Driver Turnover and Retention in the Trucking Industry."* Center for Intermodal Freight Transportation Studies: Memphis and Nashville, March 2009.

[46] http://www.trucking.org/article/New%20Report%20Says-National-Shortage-of-Truck-Drivers-to-Reach-50,000-This-Year

[47] Costello, B. and Suarez, Rod, *Truck Driver Shortage Analysis 2015*. Arlington, VA: American Trucking Associations. October, 2015. p. 4.

intended for unemployed workers and veterans to pay for training while others become indebted to carriers and associated training schools to pay for their training.[48] Over the last two decades these firms have brought into the industry several million workers who quickly left after working as employees and living out of the trucks they operate for weeks at a time, sometimes earning less than minimum wage. These inexperienced employees are often convinced for a time that the solution to their problems is to become Lease-Operators, which, they are told, will give them greater control over their work and lives.[49]

Unfortunately, lease-operating has the opposite effect, instead placing even greater pressure on workers to work continually, sometimes for months at a time. When these workers do return home for a few days, they will end up earning very little take-home pay, many times even owing the motor carriers they work for hundreds of dollars. This outcome is a result of how firms structure their relationships with Lease-Operators. In such weeks, workers like Mr. Oliveira can easily work what most Americans would consider a full-time week of 40 hours or more and still end up *owing money* to their employer.[50]

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[48] Hoffman, Matthew and Burks, Stephen V.

[49] Viscelli, Chapter 3.

[50] See Viscelli, Chapter 4.

C. The Lease-Operator Model Negatively Impacts the Trucking Industry.

While these practices have come to set the competitive standard in some segments over the last decade or so, the negative impact of these practices has not affected traditional employers throughout much of the trucking industry until quite recently.[51] Better employers have historically enjoyed a stable workforce with very low turnover.[52] Now, as that workforce has aged and is beginning to retire at greater rates,[53] the practices of these high-turnover carriers will affect more of the industry and consumers through higher prices.[54] In short, a large portion of what should have been the nation's next generation of truck drivers has been cycled in and out of trucks under the control of firms like Prime and, as a result, has written off trucking as a place to make a career.

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[51] Longton, Linda, March 21, 2018, "*Special Report: Day of Reckoning in Driver Shortage Saga.*" Commercial Carrier Journal. https://www.ccjdigital.com/part-1-day-of-reckoning-in-driver-shortage-saga/

[52] American Trucking Associations, 2012, *Benchmarking Guide for Driver Recruitment and Retention*. Arlington VA: American Trucking Associations.

[53] Costello, Bob, *Truck Driver Shortage Analysis 2017*, October 2017. Arlington VA: American Trucking Associations.

[54] Large firms are already experiencing much higher freight costs, for example see: https://money.cnn.com/2018/05/14/news/companies/truck-drivers-freight-costs/

III. THIS COURT SHOULD NOT FOSTER MISCLASSIFICATION OF DRIVERS BY PERMITTING EMPLOYERS WHO MISCLASSIFY DRIVERS TO REQUIRE RESOLUTION OF DISPUTES THROUGH ARBITRATION UNDER THE FAA.

Workers who must arbitrate their claims are 59% less likely to win than those who take their case to federal court and 38% less likely to win than workers litigating in state courts.[55] The median award in mandatory arbitration is 21% of the median award in the federal courts and 43% of the median award in the state courts.[56]

Because arbitration clauses typically now include a bar to collective enforcement, it will be difficult for workers to bring the issue of misclassification in the trucking industry forward. Since arbitration awards are not normally reviewable on appeal, and have no *stare decisis* effect, arbitration will not be an effective tool for remedying the widespread abuse caused by misclassification in the trucking industry.

Employers who misclassify employees stand to gain significantly by using forced arbitration to resolve disputes. This Court should not read the FAA in a way that allows them to require arbitration of disputes about the nature of employment in the industry.

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[55] Economic Policy Institute Report: https://www.epi.org/files/2015/arbitration-epidemic.pdf pm19-20

[56] *Ibid.*

CONCLUSION

The judgment for the Court of Appeals for the First Circuit should be affirmed.

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